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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOSE MARIA GOMEZ, Defendant and Appellant.	H033122 (Santa Clara County Super. Ct. No. CC625606)

I. INTRODUCTION

After a jury trial, defendant Jose Maria Gomez was convicted of three counts of aggravated sexual assault (forcible rape) of a child under the age of 14 and 10 or more years younger than defendant (former Pen. Code, § 269, added by Stats. 1994, 1st Ex. Sess., ch. 48, § 1, eff. Nov. 30, 1994, § 261, subd. (a)(2); counts 1-3) and three counts of lewd or lascivious act on a child by force (§ 288, subd. (b)(1); counts 5-7).[1] The trial court imposed a total term of 45 years to life.

On appeal, defendant contends that the convictions should be reversed because certain comments made by the prosecutor during closing argument constitute prejudicial misconduct. Defendant also contends that the trial court committed sentencing error

[1] All statutory references hereafter are to the Penal Code unless otherwise stated.

when the court imposed consecutive sentences of 15 years to life on counts 2 and 3. For the reasons stated below, we disagree and therefore we will affirm the judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *The Information*

The information filed on March 2, 2007, charged defendant with seven felony offenses involving victim D: four counts of aggravated sexual assault (forcible rape) of a child under 14 who was 10 or more years younger than the defendant on or about and between September 2, 2000, and September 1, 2001 (former § 269, § 261, subd. (a)(2); counts 1-4); and three counts of lewd or lascivious act on a child, by force, violence, duress, menace and fear on or about and between September 2, 2000, and September 1, 2001 (§ 288, subd. (b)(1); counts 5-7).

The information also charged defendant with the felony offense of threats to commit a crime resulting in death or great bodily injury on or about and between September 2, 2000, and September 1, 2001 (§ 422; count 8).

B. *Trial*

The case proceeded to a nine-day jury trial in February 2008. A brief summary of the prosecution evidence and the defense evidence follows.

1. Prosecution Evidence

Y. had a very young daughter, victim D., before she married defendant in 1995. From 1995 through 2000, Y. and D. lived with defendant and his extended family in San Jose. During their marriage, Y. and defendant had a son, J. Defendant's family of four (including defendant, Y., D. and J.) all slept in the same room in the San Jose house, with the children sleeping in bunk beds beside the queen-sized bed occupied by Y. and defendant. D. slept in the top bunk bed.

In 2000, D. was seven years old and her brother J. was four years old. Y. was employed by a restaurant where she sometimes worked the night shift and did not get

home until 10:00 or 10:30 p.m. When Y. was away at night, defendant was left in charge of the children in their San Jose home.

D. testified that one night when she was seven and her mother was at work, defendant touched her for the first time in a way she did not like. She was sleeping in the top bunk bed when defendant took her out of her bed and brought her down to his bed. J. was sleeping in the bottom bunk and did not wake up. After defendant put D. on his bed, he took her clothes off below the waist and started touching her with his hand. She tried to get away from defendant but he grabbed her hand and would not let her go. Defendant turned her over to face him and put his penis inside her vagina. D. did not notice any bleeding afterwards. At the time of trial, D. (now 14 years old) did not remember whether she felt any pain.

After he was finished, defendant pulled up D.'s clothes and took her back to her bed. He told D. not to tell anyone or he would hurt her mother. Because she was scared, D. did not tell her mother or anyone else about the rape.

A short time later, defendant raped D. again while her mother was working the night shift. As before, D. was sleeping in the top bunk bed and J. was sleeping in the bottom bunk bed when defendant carried her down to his bed. He pulled her pants down her legs and put his penis inside her. When D. tried to get away, defendant grabbed her hand and pulled her back towards him. At the time of trial, D. did not remember whether she felt pain when defendant put his penis inside her.

Defendant raped D. a third time when she was still seven years old. Again, D. was sleeping in the top bunk bed and J. was sleeping in the bottom bunk bed. She woke up when defendant tapped her on the shoulder and carried her to his bed. Defendant pulled her pants down to her knees and lay down next to her. D. tried to get away but defendant grabbed her hands. He put his penis inside her and afterwards returned her to her bed. At some point, defendant also asked D. to touch his penis with her mouth, but she refused.

At the time of trial, D. did not remember feeling any pain during the third rape. After her recollection was refreshed with her preliminary hearing testimony, D. testified that during the three rapes defendant also touched her breasts over her clothing. D. also estimated that defendant's penis was about three inches inside her during the rapes.

Y. and defendant ended their relationship around the end of 2000. Y. and the children then moved to Sunnyvale and defendant eventually moved to Modesto or Ceres, where he remarried.[2] Defendant would pick up his son, J., for overnight visits in Ceres and he sometimes invited D. to come along. D. went to Ceres with defendant and J. about two or three times because J. wanted her to go. During the overnight visits to Ceres, D. slept in defendant's bedroom in the bed with J. while defendant slept on the ground. During one visit, when D. was in third grade in 2002 or 2003, defendant pulled her off the bed, took her down to the ground, pulled her pants down, and put his penis in her vagina. D. tried to get away but defendant stopped her. Afterwards, he pulled her clothing up and she went back to bed.

The last time that defendant invited D. to visit Ceres, Y. recalled, D. did not want to go. Sometime after defendant raped D. in Ceres, D. found out that defendant had remarried. D. was happy for him, but she did not like his new wife. D. and defendant did not have a close relationship, although she had looked at him as a father when they lived in San Jose.

By December 2005, D. was in sixth grade at a middle school. At that time, D. decided to tell her teacher, Molly Wright, about the rapes because she had watched a Spanish-language talk show about stepfathers raping their own children. D. trusted her teacher and felt close to her. She told Mrs. Wright that she wanted to tell her something

[2] The record is unclear as to whether defendant moved to Modesto or Ceres. For convenience, we will indicate hereafter that defendant moved to Ceres.

but she was scared because defendant had said that he was going to kill her mother if she told anyone. Although D. was reluctant and upset, she eventually told Mrs. Wright that her stepfather had touched her.

After D. told Mrs. Wright about her stepfather, Mrs. Wright contacted the vice-principal. D. was then called into the vice-principal's office where she met with Mrs. Wright, as well as Tyson Green, a Santa Clara police officer who served as the school resource officer, and the vice-principal, Dawnel Sonnthe. A second meeting with everyone except Mrs. Wright took place the same day after D.'s mother, Y., arrived. During the school meetings, D. told the officer what defendant had done to her, including touching her breasts on three occasions, except that she did not tell him about being raped because she was too nervous and scared to talk about it.

Y. learned for the first time at the school meeting that defendant had touched D. After Y. and D. returned home from the meeting, D. told Y. that defendant had raped her three times. Y. then telephoned Officer Green and handed the telephone to D., who told him about the rapes.

Sometime later, Y. received a telephone call from Detective Ken Tran, a San Jose police officer. Y. brought D. to the police station where she was interviewed by Detective Tran on January 3, 2006. D. told Detective Tran, to the best of her memory, all of the things that defendant had done to her, except that she did not tell him about the rape in Ceres. She said that defendant had sexual intercourse with her three times when she was seven years old and fondled her breasts and vaginal area over her clothing. D. also told Detective Tran that she felt pain after the first sexual assault and during the second and third sexual assaults. D. also said that when she tried to leave, defendant held her down by grabbing her hands.

At Detective Tran's request, D. placed a pretext telephone call to defendant while she was at the police station. Detective Tran instructed D. to talk to defendant about the

incident while a Spanish-speaking officer, Detective Carlos Melo, listened to the call. A CD recording of the telephone call was played for the jury. During the telephone call, the following colloquy took place between D. and defendant, as recorded in the transcript of the call:

"[D.]: Think about what you did to me.

"[Defendant]: Honey, but you know, forget about that don't do that. Don't be saying that.

"[D.]: You know what? I'm getting older and older, and I can't keep this inside. I can't keep this inside me.

"[Defendant]: Just forget about it, you know?

"[D.]: I can not forget about it.

"[Defendant]: You know, your [*sic*] relationship with your mom didn't work. You have to understand there are a lot of things, you don't go right. You know how your mom was treating me. You know? Now, that whole thing right now is about your brother. And forget about thing [*sic*].

"[D.]: Why did you do it then?

"[Defendant]: (Pause) You know we all make mistakes, [D.].

"[D.]: What?

"[Defendant]: We all make mistakes, and huh, and a lot of times. You just have, we just have to live with those mistakes."

Another colloquy took place during the pretext telephone call, as follows:

"[Defendant]: I didn't do anything. Sweetie, I didn't do anything, ok?

"[D.]: Talk about what you did to me, talk about it.

"[Defendant]: No. Because I didn't do anything sweetie, you know I don't know why you're getting into this because it never happened.

"[D.]: You just don't want to talk about it because your wife is there.

"[Defendant]: If I you know [*sic*], I'm sorry if the relationship didn't work with your mom and I, I didn't think it was going to hurt you that bad, ok? Let's just move along, ok? I can try to help your mom as much as I can, you know by supporting your little brother, ok?"

After D. spoke to Detective Tran, Y. took her to Santa Clara Valley Medical Center for a SART (sexual assault response team) examination that was performed by a physician's assistant, Mary Ritter, on February 13, 2006. Ritter's findings on examination of the vaginal area were normal, with no healed tears and an estrogenized hymen. According to Ritter, it is possible for sexual penetration of a young child to have occurred without any abnormal findings on a subsequent examination. She estimated that of the 4,000 SART examinations she has performed, she has found definite evidence of penetrating trauma in 10 to 15 percent of children. Therefore, Ritter believed that a normal vaginal examination did not rule out prior penetrating trauma. She also stated that it would be unusual to see evidence of penetrating trauma three years after the trauma occurred, unless a "remarkable scar or healed area" remained.

Prosecution witness Carl Lewis, a senior criminal investigator for the district attorney's office, testified as an expert in child abuse accommodation syndrome, which concerns "the myths that the adult community holds about child sexual abuse victims and child sexual abuse." According to Lewis, the disclosure of sexual abuse by a child is often a process, rather than a one-time event. It is typical for the child to disclose sexual abuse to someone outside the nuclear family. The child's disclosure may also be delayed, conflicted, and unconvincing.

After completing the prosecution's case-in-chief, the prosecutor moved to dismiss count 8 (§ 422, threats to commit a crime resulting in death or great bodily injury on or about and between September 2, 2000, and September 1, 2001) for insufficiency of the evidence. The trial court granted the motion.

2. Defense Evidence

Anthony Damore, M.D., testified as the defense expert in gynecology. His fee for testifying was $1,500 for a half-day. Dr. Damore reviewed some materials in connection with the case, including the police reports, photographs taken at Valley Medical Center of D.'s vagina and hymen, a letter prepared by Mary Ritter, and a photograph of defendant's penis. In Dr. Damore's opinion, D.'s hymen and the surrounding tissue appeared to be normal. He observed no evidence of bleeding, spotting or other secretions, and noted that D. did not mention any pain during intercourse. Based on his review, Dr. Damore concluded that it was not likely that D. had experienced penile penetration. Dr. Damore also stated that the hymen in a seven-year-old girl could not accommodate a three-inch penile penetration without injury. Additionally, he believed that it was improbable that the hymen in a seven-year-old girl would remain intact after penile penetration. Dr. Damore agreed, however, with Mary Ritter's opinion that the absence of penetrating trauma did not rule out the possibility of the sexual contact alleged by D.

The defense witnesses also included defendant's daughter, C., defendant's wife, and his sisters. Defendant's family members generally testified that they never saw defendant touch D. in an inappropriate manner that D. appeared to have no fear of defendant, and defendant treated D. well. Defendant's daughter C. also testified that she is three years older than D. and used to spend time with D. at the family home in San Jose when defendant was married to D.'s mother. C. recalled that defendant treated C. and D. equally and D. was affectionate towards him. D. also visited C.'s family in Ceres and seemed comfortable about going there. C. further recalled that D. had said that she did not want to see defendant with anyone but D.'s mother.

3. Jury Verdict and Sentencing

On February 27, 2008, the jury found defendant guilty on all counts except count 4 (aggravated sexual assault forcible rape of a child under 14 who was 10 or more years

younger than the defendant on or about and between September 2, 2000, and September 1, 2001 (former § 269, § 261, subd. (a)(2)), where there was no verdict.

At the sentencing hearing held on May 30, 2008, the trial court imposed a sentence of 15 years to life on count 1 and consecutive sentences of 15 years to life on counts 2 and 3. The court also imposed the middle term of six years on counts 5, 6, and 7, to run concurrently with the sentences on counts 1, 2, and 3.

Defendant filed a timely notice of appeal on July 3, 2008.

III. DISCUSSION

A. *Prosecutorial Misconduct*

Defendant contends that several comments made by the prosecutor during closing argument constitute prejudicial misconduct. We will address each comment in turn after first noting the standards that govern our review of a claim of prosecutorial misconduct.

"The standards governing review of misconduct claims are settled. 'A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such " 'unfairness as to make the resulting conviction a denial of due process.' " [Citations.] 'Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial.' [Citation.] 'In order to preserve a claim of misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review.' [Citation.]" (*People v. Friend* (2009) 47 Cal.4th 1, 29.)

1. *Griffin* Error

Defendant's first contention is that the prosecutor made two statements during closing argument that improperly commented upon his failure to testify, in violation of *Griffin v. California* (1965) 380 U.S. 609, 615 (*Griffin*).) "Pursuant to *Griffin*, it is error

for a prosecutor to state that certain evidence is uncontradicted or unrefuted when that evidence could not be contradicted or refuted by anyone other than the defendant testifying on his or her own behalf. [Citations.]" (*People v. Hughes* (2002) 27 Cal.4th 287, 371-372.) It is also "error for the prosecution to refer to the absence of evidence that only the defendant's testimony could provide. [Citations.]" (*Id*. at p. 372.) However, *Griffin* does not prohibit " ' "comments on the state of the evidence or on the failure of the defense to introduce material evidence or call logical witnesses." ' [Citations.]" (*People v. Harrison* (2005) 35 Cal.4th 208, 257.)

The specific comments that defendant contends constitute *Griffin* error were made in the context of the prosecutor's argument regarding the pretext telephone call that D. made to defendant at Detective Tran's request. Defendant asserts that the improper comments were made immediately after the prosecutor told the jurors: "Your role is to decide the evidence in this case. What is not your role is to say that the pretext call was sneaky. I don't like the way that . . . pretext call went. I'm going to find him not guilty. Remember your oath, your role, and the Judge's role. That evidence is legally permissible. It's allowed under the law to make a phone call like that. So you can't decide that I don't like the phone call so I'm not going to find him not guilty."

The first comment that defendant claims was *Griffin* error immediately followed the statements quoted above and was italicized by defendant in his opening brief, as follows: " 'Seven counts. Yes, it's a lot. But we are talking about numerous acts over many days. Police officers don't know what a good defense attorney will say is important or crucial. Was a crime committed. Yes. *Did the defendant know who committed a crime. Yes.* [Defense counsel] is a good attorney. He's giving the defendant the best defense he can. That's why he's going with this false allegation.' "

According to defendant, "[b]y referring to [defendant's] alleged 'knowledge' of the crime, the prosecution was indirectly referring to his failure to explain what he knew.

This inference was further solidified during rebuttal when the prosecution again emphasized the failure of [defendant] to explain his statements in the pretext call: [¶] The pretext. *We only have the defendant's words.* No evidence he knew he was being recorded because he *never thought he would have to explain his answers*."

Defendant maintains that the comments italicized above constitute *Griffin* error because "[t]he only person who could testify as to [defendant's] 'knowledge' was [defendant] himself. Likewise, [defendant] was the only person who could 'explain his answers.' " Alternatively, defendant argues that defense counsel's failure to object to the prosecutor's comments constitutes ineffective assistance of counsel.

The People respond that defense counsel's failure to object resulted in a waiver of defendant's claim of *Griffin* error. Alternatively, they argue that the claim lacks merit because nothing in the prosecutor's comments explicitly or implicitly referred to defendant's failure to testify.

We recognize that where, as here, defense counsel did not object at trial to alleged prosecutorial misconduct, the defendant may argue on appeal "that counsel's inaction violated the defendant's constitutional right to effective assistance of counsel." (*People v. Lopez* (2008) 42 Cal.4th 960, 966 (*Lopez*).) However, where the prosecutor's comments were not improper, there was no reason for an objection by defense counsel and the claim of ineffective assistance of counsel must fail. (*Id.* at p. 968.)

We will address the merits of defendant's claim of *Griffin* error despite the lack of any objections below. To evaluate a claim of prosecutorial misconduct during closing argument, we apply the following general rules: " 'To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood that the jury understood or applied the complained-of comments in an improper or erroneous manner.' [Citation.]" (*People v. Wilson* (2005) 36 Cal.4th 309, 337.) "In conducting this inquiry, we 'do not lightly infer' that the jury drew the most

damaging rather than the least damaging meaning from the prosecutor's statements." (*People v. Frye* (1998) 18 Cal.4th 894, 970, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) The defendant must also overcome the presumption that the jury "treated 'the prosecutor's comments as words spoken by an advocate in an attempt to persuade' [citation] . . . ." (*People v. Cole* (2004) 33 Cal.4th 1158, 1204.) Additionally, while a defendant may single out certain comments made by the prosecutor during closing argument in order to demonstrate misconduct, as the reviewing court we "view the statements in the context of the argument as a whole." (*Id.* at p. 1203.)

Having reviewed the prosecutor's closing and rebuttal arguments in their entirety, we are not convinced that there is a reasonable likelihood that the jurors understood the prosecutor to improperly comment upon defendant's failure to testify (*Griffin*, *supra*, 380 U.S. at p. 615), to state that certain evidence was uncontradicted or unrefuted when that evidence could only be contradicted or refuted by the defendant testifying on his or her own behalf (*People v. Harrison*, *supra*, 35 Cal.4th at p. 257), or to refer to the absence of evidence that only the defendant's testimony could provide (*ibid*).

First, the prosecutor's comment, "Did the defendant know who committed a crime. Yes," may be reasonably construed as a fair comment on the evidence provided by the pretext telephone call, since the comment followed not only the prosecutor's lengthy description of other prosecution evidence that supported D.'s testimony, but also the prosecutor's interpretation of the pretext telephone call itself. For example, the prosecutor's argument included the following interpretation of a portion of the dialogue between D. and defendant during the call: "Don't you remember you took off my clothes? He wants no part of that conversation. No, no, listen, [D.], stop. Remember you taking me off the bed? I don't want to talk about it. He shuts her down. She tries to go through the facts and talk with him about it. He's not having it. He wants no part of

that conversation. Remember when you took off—listen, [D.], stop. Don't be saying that. We lived in San Jose. I don't want to talk about this. Look, my wife, she's getting—she is worrying about what is going on. [¶] He remembers. He knows. He doesn't want to be reminded about what he did. He doesn't want to be reminded that she knows what he did. He doesn't wan[t] to be reminded how he raped her repeatedly."

Viewed in context, we believe that the prosecutor's statement, "Did the defendant know who committed a crime. Yes," constituted the prosecutor's fair comment that a reasonable inference--that defendant was conscious of his guilt--could be drawn solely from defendant's responses to D.'s questions during the pretext telephone call. There was no implication that only defendant's testimony could refute the inference that defendant knew he was guilty, because it was already established through the fact of the trial and the trial evidence that defendant had denied his guilt.

Second, we find that the comment that defendant claims as *Griffin* error during rebuttal argument ("The pretext. *We only have the defendant's words*. No evidence he knew he was being recorded because he *never thought he would have to explain his answers*") is additional fair comment that the jurors could reasonably infer from the pretext telephone call that defendant was conscious of his guilt.

Our review of the transcript of the prosecutor's closing argument shows that the context of the complained-of comment included the following: "The pretext. We only have defendant's words. No evidence he knew he was being recorded because he never thought he would have to explain his answers. He didn't want his wife to hear, and he wanted to placate [D.] like I said. He didn't want her to report. Didn't want her to talk to the police or her mom." We find that these comments on defendant's responses during the pretext telephone call, while inartfully stated, would not be reasonably understood by the jury to comment upon defendant's failure to testify. Moreover, to the extent the comments could be understood as pointing to evidence of defendant's guilt that only

defendant could contradict or explain, we find the comments were not improper since it would have been obvious to a reasonable juror that defendant had denied that he was guilty and his defense was that D. was lying about what defendant had done to her.

We also find the prosecutor's comments to constitute fair comment on the evidence since the jurors could have reasonably understood that the prosecutor was arguing that defendant's words during the pretext telephone call should be given great weight since defendant was unaware that he was being recorded and therefore he was unguarded in what he said to D.

For these reasons, we determine that the prosecutor's comments regarding the pretext telephone call do not constitute *Griffin* error.

2. Personal Opinion

According to defendant, the prosecutor committed prejudicial misconduct during closing argument when the prosecutor stated his personal belief in defendant's guilt.

The California Supreme Court has instructed that " '[a] prosecutor may not express a personal opinion or belief in the guilt of the accused when there is a substantial danger that the jury will view the comments as based on information other than evidence adduced at trial.' [Citations.]" (*Lopez, supra*, 42 Cal.4th at p. 971.) "The danger that the jury will view the prosecutor's expressed belief in the defendant's guilt as being based on outside sources 'is acute when the prosecutor offers his [or her] opinion and does not explicitly state that it is based solely on inferences from the evidence at trial.' [Citation.]" (*Ibid.*)

Not all expressions of personal opinion by the prosecutor are improper, however. To determine whether the prosecutor's comments constitute an improper expression of personal opinion or belief in the defendant's guilt, we apply the following test: " '[t]he prosecutor's comments must . . . be evaluated in the context in which they were made, to ascertain if there was a substantial risk that the jury would consider the remarks to be

based on information extraneous to the evidence presented at trial.' [Citations.]" (*Lopez, supra,* 42 Cal.4th at p. 971.)

Applying this test, the court in *Lopez* found that the prosecutor's statement during closing argument, " 'I think his client is guilty,' " did not constitute prosecutorial misconduct. (*Lopez, supra*, 42 Cal.4th at p. 971.) "To the contrary: Because [the prosecutor's] statement that she believed defendant was guilty immediately followed her comment that, in her view, defense counsel's cross-examination of the victims demonstrated that they were credible, a reasonable juror would most likely infer that the prosecutor based her belief in defendant's guilt on the credibility of the victims' testimony at trial." (*Ibid.*)

In the present case, defendant contends that the following comment by the prosecutor during closing argument constituted improper personal opinion: "People don't want to convict an innocent man. Neither do I." According to defendant, "[t]he prosecution by informing the jury that he would not prosecute 'an innocent man,' communicated to the jury that he personally believed in [defendant's] guilt. This was misconduct."

The People note that defense counsel did not object to these statements at trial. They also argue that the prosecutor's statements were not improper because, viewed in context, the statements "simply reflected the prosecutor's understanding of a jury's fear of convicting an innocent person. The prosecutor sought to persuade the jury that the evidence proved his guilt."

Our review of the closing argument that preceded the complained-of comment shows that the context of the comment was the prosecutor's attempt to persuade the jury that the evidence at trial showed there was no merit to the defense that the sex crimes allegations were false. Immediately before making the complained-of comment, the prosecutor made the following argument: "False allegation. No. So her motive, as I

understand, for making this up is because there's no more trips to Ceres or the defendant is remarried. That's ridiculous. He's been remarried a long time. She's only been to Ceres once that the defendant's wife can remember. That's not a motive. Why make it up versus the defendant? If [*sic*] everything his witnesses have said, he is someone that is kind to her, loving to her. So now she's just making this up to get back at him and his wife. That doesn't make sense. Two years she carries on with this lie? No. Not to suffer this long."

The prosecutor then argued, "Is her behavior consistent with a true victim? Yes. What do we mean by that? A true victim is reluctant, fears the situation will be exacerbated and retaliation will result. She's reluctant to talk about it. She fears the situation will be exacerbated. Afraid of what will happen. False victim shows a little ambivalence and fear. Seeming indifferent about events. In which category does she fit in?" It's obvious. True victim."

Next, the prosecutor said, "Other false allegations against anyone else ever? No, because if there were, you would have heard about it. So defendant helps raise [D.]. She makes this up. No way. They're not close. Why did I ask those questions? No cards, no presents, no pictures, no phone calls. Just an occasional wave of hello. False allegation? No. He doesn't live with her. It's not to get out of the house. There's no custody fight. This has nothing to do with molestation. If mom was behind it, disclosure would have come from her, not from the school. She's not the RP [*sic*], the school is."

The prosecutor continued, "More on mom. Really, what mom wouldn't take her child to the police if they disclosed sexual abuse? What mom wouldn't call the officer back and say there is more information by the way. Of course, that is the way any parent would act. Sure mom just wants the police to do their job and do it right. Know these defense arguments are new. [*Sic*] It's the mom driving it. You know these are all false. This is the same thing that is in every sexual assault case. None of it is new. [¶] False

allegation? No. Wrongful conviction. That's just a scare tactic. You don't have to worry about it here. In terms of bad DNA or bad I.D. procedure, cross-racial I.D., none of that is present in this case. She recollects the person that committed these acts. She knows him. [¶] The defendant. In terms of wrongful conviction, that's just a play on everyone's worst nightmare. *People don't want to convict an innocent man. Neither do I.* Years later how could a man defend himself against these kinds of charges?" (Italics added.)

Viewed in the context in which they were made, we find there was no substantial risk that the jurors would have considered the comments, "People don't want to convict an innocent man. Neither do I," to be based on information extraneous to the evidence presented at trial. (*Lopez*, *supra*, 42 Cal.4th at p. 971.) To the contrary, we believe that reasonable jurors would most likely have inferred that the prosecutor's belief in defendant's guilt was based on the trial evidence that the prosecutor had just argued, as quoted above, to persuade the jurors that D. was telling the truth about defendant's sexual conduct. We emphasize, however, the California Supreme Court's instruction that " 'prosecutors should refrain from expressing personal views which might unduly inflame the jury against the defendant.' [Citation.]" (*People v. Rowland* (1992) 4 Cal.4th 238, 281.)

We also determine, as did our Supreme Court in *Lopez*, that "[e]ven if we were to assume, for argument's sake, that the prosecutor's comment was improper, defendant would still not be entitled to relief." (*Lopez*, *supra*, 42 Cal.4th at p. 971.) As stated in *Lopez*, "[r]eversal of defendant's conviction would be warranted only if counsel's failure to object [to the improper comments] violated defendant's constitutional right to the effective assistance of counsel. But as we have pointed out, except in those rare instances where there is no conceivable tactical purpose for counsel's actions, claims of ineffective assistance of counsel should be raised on habeas corpus, not on direct appeal. [Citations.]

This is particularly true where, as here, the alleged incompetence stems from counsel's failure to object. '[D]eciding whether to object is inherently tactical, and the failure to object will rarely establish ineffective assistance.' [Citations.]" (*Lopez, supra,* 42 Cal.4th at pp. 971-972.)

We therefore determine that defendant's contention that prosecutorial misconduct occurred when the prosecutor gave an improper personal opinion lacks merit.

3. Fabricating a Defense

Defendant also contends that the prosecutor committed misconduct during closing argument by implying that defense counsel had fabricated a defense.

"A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel. [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 832, 952.) Thus, the prosecutor's "unsupported assertion" that defense counsel has fabricated a defense constitutes misconduct. (*People v. Bain* (1971) 5 Cal.3d 839, 849-850.)

Defendant claims that the following statement by the prosecutor implied that defense counsel had fabricated a defense: "[Defense counsel] is a good attorney. He's giving defendant the best defense he can. That's why he's going with this false allegation." Defendant also points to this statement, as quoted in his opening brief: " 'Know these defense arguments are [not] new. It's the mom driving it. You know these are all false. This is the same thing in everything that is in every sexual assault case. None of it is new. [¶] False allegation? No. Wrongful conviction. That's just a scare tactic.' "

Defense counsel immediately objected at trial to the prosecutor's statement, "[Defense counsel] is a good attorney. He's giving defendant the best defense he can. That's why he's going with this false allegation," as set forth in the following colloquy:

"[DEFENSE COUNSEL]: Your Honor, I would object to that.

"THE COURT: Not that you are a good attorney?

"[DEFENSE COUNSEL]: Not that part. The part about what my intentions are. What my strategies are. He has no way of knowing that.

"[PROSECUTOR]: In his opening statement, I listened just like you did. So I have a pretty good idea where he is going with this. If I'm wrong, then I'll address that later.

"[THE COURT]: Remember these are comments by the attorneys, what they believe the evidence is."

The People contend that defendant's not guilty plea constituted defendant's statement that the allegations of child molestation were false, which was his only defense in this case. Therefore, they claim that "[t]he prosecutor's statement of the obvious was not misconduct."

Having reviewed the transcript of both parties' closing arguments, we do not find that a reasonable juror would infer from the prosecutor's comment that defense counsel "was going with a false allegation," that the prosecutor meant that defense counsel had fabricated a defense. The phrase "false allegation" could be reasonably understood to refer to the obvious defense in this case: that the allegations that defendant had molested D. were false because D. was lying. Indeed, defense counsel emphasized during his closing argument defendant's position that D. was lying and her testimony was unbelievable. For example, defense counsel argued, "There is nothing vague or ambiguous about [D.'s] testimony. She came in here. She said what she wanted to say, and she said it with precision. The problem is that it was not accurate or consistent. It didn't hold together. She had a tremendous motive to do this."

Accordingly, we reject defendant's contention that the prosecutor committed misconduct by implying that defense counsel was fabricating a defense. We also find

that the trial court's admonishment, "Remember these are comments by the attorneys, what they believe the evidence is," properly cured any potential harm.

4. Different Standard of Proof

Defendant also contends that the prosecutor committed misconduct by arguing that the standard of proof was different or irrelevant.

It is misconduct for the prosecutor to make statements that "could reasonably be interpreted as suggesting to the jury" that the prosecutor "did not have the burden of proving every element of the crimes charged beyond a reasonable doubt. [Citations.]" (*People v. Hill, supra,* 17 Cal.4th at p. 831.)

According to defendant, the prosecutor rebutted the presumption of innocence when he made the following statements, which defendant italicized in the following quote from the opening brief: " 'We remember from our history the assassination of John F. Kennedy . . . . Mr. Oswald was arrested, was taken to Dallas County Jail, and two days later as he was being led out on national television in front of the media and photographers a man named Jack Ruby stepped up and shot him. This was the photograph that ran in the newspapers all across the country the next day. Jack Ruby stepping up and shooting Lee Harvey Oswald. [¶] Under our Sixth Amendment right Jack Ruby was entitled to trial by jury. He still had the right to have witnesses called in against him to testify against him. [*Sic*] Just like the defendant has that right. He has the right under our Sixth Amendment to a trial by jury. That doesn't make him any less guilty. *Doesn't mean there are any issues in this case.*' "

Defendant also directs our attention to another portion of the prosecutor's closing argument: "Something may have happened, but I'm not sure what. That's a copout.[3]

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[3] The dictionary definition of "cop out" is "to back out (as of an unwanted responsibility" or "to avoid or neglect problems, responsibilities, or commitments . . . ." (Merriam-Webster's Collegiate Dict. (10th ed. 1999) p. 256, col. 1.)

That's a copout. Trying to give you an out to take and say, well, you know, we think something has happened, but we don't know what it was. We're going to find him not guilty."

Defendant claims that the prosecutor, by making the statements quoted above, argued that "the standard of proof was irrelevant in that there 'were no issues' and it would be a 'cop out' not to believe the 12-year-old complainant.[4] This argument shifted the burden of proof, and impermissibly engaged the personal pride of the jurors."

The People disagree, arguing that defendant's claim that the prosecutor urged the jurors to adopt a different standard of proof than proof beyond a reasonable doubt is not supported by the record. They note that the prosecutor addressed the standard of proof of beyond a reasonable doubt in both his closing argument and in his rebuttal. They also argue that the context of the statements, which followed the prosecutor's discussion of the evidence, shows that the prosecutor was properly arguing that the jurors should find defendant guilty based on the strength of the evidence.

We find that this case is similar to *People v. Marshall* (1996) 13 Cal.4th 799, where the California Supreme Court rejected the defendant's claim that the prosecutor's statement in closing argument, "[Defendant] had to come up with another possible suspect to create in your minds that reasonable doubt that they want you to have when you enter that jury deliberation room," would be interpreted to improperly shift the burden of proof to the defendant. (*Id.* at p. 831, fn. omitted.) The court stated that "[i]n the context of the whole argument and the instructions, we see no reasonable likelihood [citation] the jury construed the prosecutor's remarks as placing on defendant the burden of establishing a reasonable doubt as to his guilt. When the prosecutor made the challenged comment, he had just finished reviewing the evidence presented in the

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[4] The record reflects that D. was 14 years old at the time of trial.

prosecution's case-in-chief, with the evident aim of demonstrating he had succeeded in proving defendant guilty beyond a reasonable doubt." (*Id.* at pp. 831-832.)

Here, defendant argues that the prosecutor's reference to the trial of Jack Ruby ("Just like the defendant has that right. He has the right under our Sixth Amendment to a trial by jury. That doesn't make him any less guilty. Doesn't mean there are any issues in this case") could be construed as an attempt to convince the jurors not to apply the presumption of innocence. However, our review of the context of the Jack Ruby trial reference convinces us that reasonable jurors would not so construe the reference. The prosecutor made the Jack Ruby trial reference after a lengthy argument that the evidence supported D.'s veracity, and it was preceeded by the remarks, "Now, this is no set up or false allegation. It's not. This is no set up. This is no case of false allegations." Therefore, when the prosecutor referenced the Jack Ruby trial, it was in the context of trying to persuade the jurors beyond a reasonable doubt that defendant had committed the alleged sex crimes based on D.'s testimony.

Similarly, we find no misconduct when the following complained-of comments are viewed in context: "Something may have happened, but I'm not sure what. That's a copout. That's a copout. Trying to give you an out to take and say, well, you know, we think something happened, but we don't know what it was. We're going to find him not guilty." Again, the complained-of comments followed the prosecutor's lengthy argument regarding the evidence in support of D.'s veracity, as demonstrated by their context: "Years later how could a man defend himself against these kind of charges. [¶] The flip side is how could a victim ever get justice for molestation years after the fact? Delayed disclosure is very common in these cases. It's not uncommon at all. Something may have happened, but I'm not sure what. That's a copout. That's a copout. Trying to give you an out to take and say, well, you know, we think something happened, but we don't know what it was. We're going to find him not guilty. [¶] [D.] described rape. Lewd

acts committed by this man. Don't say something may have happened and we just don't know what it is. We know what he did. It is called child molestation."

Thus, the context of the complained-of comments was the prosecutor's continual attempt to persuade the jurors that defendant was guilty beyond a reasonable doubt, based on D.'s testimony. Moreover, the prosecutor did not argue that a different standard of proof than proof beyond a reasonable doubt should be applied by the jury, and the trial court properly instructed the jury that the standard of proof was proof beyond a reasonable doubt.[5]

We therefore determine that there is no merit to defendant's claim that the prosecutor committed prejudicial misconduct by arguing that the standard of proof was different or irrelevant.

5. Personal Attack on Defense Expert

Defendant contends that the prosecutor committed misconduct during closing argument by expressing contempt for the defense expert, Dr. Damore, and by implying that Dr. Damore should have spoken to D., Mary Ritter, and the investigating officer, Detective Tran, who were prosecution witnesses.

"It is within the bounds of proper argument to attack the credibility of defense expert witnesses, and the weight to be given their testimony, based on the witnesses' compensation and the fact of their employment. (See Evid.Code, §§ 722, subd. (b), 780, subd. (f); [citations].)" (*People v. Babbitt* (1988) 45 Cal.3d 660, 702.) Therefore, "the prosecutor has considerable leeway in suggesting an expert may testify a certain way for financial gain or other reasons, without committing misconduct." (*People v. Salcido*

[5] The trial court instructed the jury, "Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt. [¶] Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt."

(2008) 44 Cal.4th 93, 154.) Additionally, the prosecutor may disparage the expertise of a defense expert witness where the prosecutor's comments are based upon the evidence. (*People v. Babbitt, supra*, 45 Cal.3d at p. 699.)

According to defendant, the following comments by the prosecutor constituted an improper personal attack on Dr. Damore: "Let's talk about Dr. Damore. Don't get me started. I had to like control myself in talking to him. $4,750, his number, he can't write a report. $4,750, and he can't even talk to the defendant, examine him or look at his genitalia before making a conclusion. Impartial? No way. This is a side job for him with good benefits. $5,000 for coming in and not even a full day's testimony. He never talked to [D.], never talked to the investigating officer. Never talked to Mary [Ritter]. Never talked to anyone really. Never has done a SART. Never watched a SART."

The People contend that the prosecutor's argument regarding Dr. Damore, when viewed as a whole, was a fair comment on the evidence and the weight the jurors should give Dr. Damore's testimony given his limited knowledge. We agree.

The prosecutor's comments disparaging Dr. Damore's expertise and implying that little weight should be given to his opinions were based upon the evidence at trial, where Dr. Damore acknowledged in cross-examination that he had not talked with either defendant, the investigating officer (Detective Tran), the victim, D., or Mary Ritter, and further acknowledged that he had never performed or watched a SART exam. Moreover, Dr. Damore did not testify that in forming his opinions he would have wanted to talk with defendant, the investigating officer, Ritter, or D., or that he had made a request to speak with any of them that was denied. Therefore, the comments implying that Dr. Damore's opinions should be discounted by the jurors due to his lack of relevant knowledge constituted fair comment on the evidence. It was also fair comment for the prosecutor to

emphasize Dr. Damore's fee[6] (*People v. Salcido, supra,* 44 Cal.4th at p. 154) and to imply that he might have testified for the defense in order to obtain a financial gain (*People v. Babbitt, supra,* 45 Cal.3d at p. 699). We also observe that defense counsel did not object to the prosecutor's comments about Dr. Damore.

Further, we are not convinced that the tone of the prosecutor's comments regarding Dr. Damore rose to the level of contempt or otherwise exceeded the bounds of proper argument. " ' "It is settled that a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.]" ' " (*People v. Williams* (1997) 16 Cal.4th 153, 221.) Additionally, a prosecutor "may even use such epithets as are warranted by the evidence, as long as these arguments are not inflammatory and principally aimed at arousing the passion or prejudice of the jury. [Citations.]" (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1251.) While the prosecutor's comments regarding Dr. Damore were vigorous, they were based on the evidence and were neither inflammatory nor aimed at arousing the passion or prejudice of the jury.

For these reasons, we find no merit in defendant's contention that the prosecutor's statements during closing argument regarding Dr. Damore constituted prejudicial misconduct.

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[6] While the prosecutor asserted in closing argument that Dr. Damore's fee in this case was $4,750, our review of the direct and cross-examinations of Dr. Damore indicates that Dr. Damore acknowledged that he had received $1,500 for his trial testimony, plus $1,500 for his preliminary hearing testimony and $250 per hour for two or three hours of record review, which adds up to a total fee of $3,500 to $3,750. The record reflects, however, that defense counsel did not object to the prosecutor's claim that Dr. Damore's fee was $4,750.

6. Misstating the Evidence

Defendant's final claim of prosecutorial misconduct during closing argument is that the prosecutor misstated the evidence by arguing that defendant had admitted sexual conduct during the pretext telephone call.

The California Supreme Court has instructed that "A prosecutor engages in misconduct by misstating facts, but enjoys wide latitude in commenting on the evidence, including the reasonable inferences and deductions that can be drawn therefrom. [Citation.]" (*People v. Hamilton* (2009) 45 Cal.4th 863, 928.) It is also prosecutorial misconduct for a prosecutor to misstate the evidence. (*People v. Davis* (2005) 36 Cal.4th 510, 550.)

Defendant asserts that the following comments by the prosecutor regarding the pretext telephone call constituted misstatements of the evidence: "And, of course, in that pretext call, there's admission of guilt," "his admissions during that call," and "Yes, he does deny some of the conduct. But he sure makes a lot of admissions, too."

The People's view is that during closing argument the prosecutor properly gave his interpretation of the many ambiguous remarks made by defendant during the pretext telephone call.

Our review of the transcript of the pretext telephone call indicates that where the prosecutor argued that the defendant had made admissions during the call, he was arguing reasonable inferences that the jurors could have drawn from listening to the call. "At closing argument a party is entitled both to discuss the evidence and to comment on reasonable inferences that may be drawn therefrom." (*People v. Morales* (2001) 25 Cal.4th 34, 44.) Here, as we have discussed, the dialogue between D. and defendant during the call included a number of statements from which it could be reasonably inferred that defendant was conscious of his guilt. The following colloquy is an example:

"[D.]: Why did you do it then?

"[Defendant]: (Pause) You know we all make mistakes, [D.].

"[D.]: What?

"[Defendant]: We all make mistakes, and uh, and a lot of times. You just have, we just have to live with those mistakes."

We therefore find no merit in defendant's contention that the prosecutor committed misconduct by misstating the evidence during closing argument.

Having concluded that none of defendant's contentions of prosecutorial misconduct has merit, we need not address defendant's further contention that the misconduct was prejudicial. Because we have concluded from our review of the record on appeal that the prosecutor did not commit misconduct, we also conclude that defendant's claim of ineffective assistance of counsel, on the ground that defense counsel failed to object to the misconduct, must fail on appeal.

B. *Sentencing Error*

In his supplemental opening brief, defendant argues that the trial court erred in imposing consecutive sentences of 15 years to life on counts 2 and 3. Both counts alleged, as did count 1, the offense of aggravated sexual assault (forcible rape) of a child under 14, who was 10 or more years younger than the defendant on or about and between September 2, 2000, and September 1, 2001 (former §269, § 261, subd. (a)(2)).

Defendant recognizes that under section 269, subdivision (b),[7] the sentence for a

[7] At the time of defendant's crimes (on or about and between September 2, 2000, and September 1, 2001) former section 269 provided, "(a) Any person who commits any of the following acts upon a child who is under 14 years of age and 10 or more years younger than the person is guilty of aggravated sexual assault of a child: [¶] (1) A violation of paragraph (2) of subdivision (a) of Section 261. [¶] (2) A violation of Section 264.1. [¶] (3) Sodomy, in violation of Section 286, when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person. [¶] (4) Oral copulation, in violation of Section 288a, when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person. [¶] (5) A violation of subdivision (a) of Section 289. [¶]

person who committed forcible rape of a child (§ 261, subd. (a)(2))[8] under the age of 14 who was 10 or more years younger than the defendant is 15 years to life. Defendant correctly points out, however, that section 667.6, subdivision (d),[9] which provides for consecutive sentences where certain enumerated sex crimes involved separate victims or the same victim on separate occasions, does not expressly provide for consecutive sentences of 15 years to life for a conviction under section 269 because a violation of section 269 is not one of the sex crimes enumerated in section 667.6.

(b) Any person who violates this section is guilty of a felony and shall be punished by imprisonment in the state prison for 15 years to life."

[8] Section 261, subdivision (a)(2) provides, "Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances: [¶] Where it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another."

[9] Section 667.6, subdivision (d) provides, "(d) A full, separate, and consecutive term shall be imposed for each violation of an offense specified in subdivision (e) if the crimes involve separate victims or involve the same victim on separate occasions. [¶] In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions. [¶] The term shall be served consecutively to any other term of imprisonment and shall commence from the time the person otherwise would have been released from imprisonment. The term shall not be included in any determination pursuant to Section 1170.1. Any other term imposed subsequent to that term shall not be merged therein but shall commence at the time the person otherwise would have been released from prison.

Subdivision (e) of section 667.6 provides, "This section shall apply to the following offenses: [¶] (1) Rape, in violation of paragraph (2), (3), (6), or (7) of subdivision (a) of Section 261."

Defendant also points to the fact that section 269 was amended by Statutes 2006, chapter 337, section 6, effective September 20, 2006, to mandate consecutive sentences of 15 years to life for a conviction under section 269 where the crimes involved separate victims or the same victim on separate occasions.[10] He argues that because the Legislature did not amend section 269 to include the consecutive sentence requirement of section 667.6, subdivision (d) until 2006, it follows that the law that existed prior to 2006 did not mandate consecutive sentences for a conviction under 269 where the crimes involved separate victims or the same victim on separate occasions.

The People disagree, emphasizing that arguments similar to defendant's were rejected in *People v. Jimenez* (2000) 80 Cal.App.4th 286 (*Jimenez*) and *People v. Figueroa* (2008) 162 Cal.App.4th 95 (*Figueroa*). Defendant acknowledges these decisions, but maintains that they were wrongly decided. Defendant does not direct us, however, to any decisions that support his position.

In *Jimenez*, the defendant was convicted of two counts of forcible sodomy with a person under the age of 14 and more than 10 years younger than the defendant (former § 269, subd. (a)(3)) and of lewd and lascivious conduct upon a child under the age of 14

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[10] Section 269 currently provides, "(a) Any person who commits any of the following acts upon a child who is under 14 years of age and seven or more years younger than the person is guilty of aggravated sexual assault of a child: [¶] (1) Rape, in violation of paragraph (2) or (6) of subdivision (a) of Section 261. [¶] (2) Rape or sexual penetration, in concert, in violation of Section 264.1. [¶] (3) Sodomy, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d), of Section 286. [¶] (4) Oral copulation, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d), of Section 288a. [¶] (5) Sexual penetration, in violation of subdivision (a) of Section 289. [¶] (b) Any person who violates this section is guilty of a felony and shall be punished by imprisonment in the state prison for 15 years to life. [¶] *(c) The court shall impose a consecutive sentence for each offense that results in a conviction under this section if the crimes involve separate victims or involve the same victim on separate occasions as defined in subdivision (d) of Section 667.6.*" (Added by Stats. 2006, ch. 337, § 6; italics added.)

(§ 288, subd. (a)). (*Jimenez, supra*, 80 Cal.App.4th at p. 288.) On appeal, the defendant argued that the trial court had erred in imposing consecutive sentences of 15 years to life on the sodomy convictions, because section 667.6, subdivision (d) does not expressly provide that it applies to violations of section 269. (*Id*. at p. 291.) The appellate court rejected this argument, explaining that the defendant "makes too much of this omission, ignoring the fact that violation of section 286 [sodomy by force] is one of the predicate offenses of section 269; one committing a forcible sodomy offense with the prescribed age disparity violates section 269. When the jury found defendant had violated section 269 under the circumstances presented here, it necessarily found that he had violated section 286 and he had done so by force or fear. Thus, the factual predicate necessary to apply section 667.6, subdivision (d) was proved beyond a reasonable doubt." (*Ibid*.)

The *Jimenez* court also reasoned, "It would irrational to suppose the Legislature intended that criminals who commit multiple violent sexual offenses would be exempt from the aggravated punishment prescribed by section 667.6 merely because their victims happened to be children under age 14 who were 10 or more years younger than they." (*Jimenez, supra*, 80 Cal.App.4th at p. 291; see also *People v. Glass* (2004) 114 Cal.App.4th 1032, 1037 [based on the legislative history of section 269, it appears that "the Legislature anticipated that a defendant convicted of violating section 269 would be subject to the sentencing requirements of section 667.6, even though section 269 was not listed in section 667.6."].)

In *Figueroa*, the defendant was convicted of two counts each of aggravated sexual assault of a minor (former § 269, subd. (a)(1)), forcibly committing lewd and lascivious acts on a minor (§ 288, subd. (b)(1)) and committing lewd and lascivious acts on a person under the age of 16 (§ 288, subd. (c)), as well as one count of forcible sodomy (§ 286, subd. (c)(2)). (*Figueroa, supra*, 162 Cal.App.4th at p. 97.) The defendant contended on appeal that the trial court had erred in imposing consecutive sentences of 15 years to life

on the two counts of aggravated sexual assault of a minor (former § 269, subd. (a)(1)). His argument was that neither section 667.6, subdivision (d) nor former section 269 provided for mandatory consecutive sentences for those offenses at the time the defendant committed them. (*Figueroa*, *supra*, 162 Cal.App.4th at p. 98.)

The *Figueroa* court was not persuaded by defendant's argument. First, the court determined that because the defendant had been convicted of violating former section 269, subdivision (a)(1), by raping the victim in violation of section 261, subdivision (a)(2), "the jury necessarily found that he committed violations of section 261, subdivision (a)(2), for which section 667.6, subdivision (d) imposes mandatory consecutive sentences." (*Figueroa*, *supra*, 162 Cal.App.4th. at p. 98.) Second, the court adopted "the reasoned analysis of our colleagues at District Five in *Jimenez*. Section 667.6, subdivision (d) was crystal clear, at the time defendant committed his crimes, in its application to the rapes that the jury in this case found beyond a reasonable doubt to have been committed. Therefore, consecutive sentencing was mandatory under that subdivision." (*Id*. at p. 100.)

We agree with the decisions in *Jimenez* and *Figueroa* that where the jury has found that the defendant is guilty beyond a reasonable doubt of violating section 269, the jury necessarily has also found that the defendant is guilty of committing the predicate offense. In the present case, as in *Figueroa*, the predicate offenses on which defendant's convictions under former section 269 were based were violations of section 261, subdivision (a)(2). Because the jury in finding that defendant was guilty of violating former section 269 necessarily also found that defendant was guilty of three separate forcible rapes of D in violation of section 261, subdivision (a)(2), we determine, in accordance with *Jimenez* and *Figueroa*, that consecutive sentences are mandatory under section 667.6, subdivision (d) for defendant's convictions under former section 269.

We therefore conclude that the trial court did not commit sentencing error when it imposed consecutive sentences of 15 years to life on counts 2 and 3.

IV. DISPOSITION

The judgment is affirmed.

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BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

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MIHARA, J.

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DUFFY, J.